Google Inc. et al v. Egger et al Doc. 596 Att. 7

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May 26, 2006

David O'Brien, Commissioner
Vermont Department of Public Service
112 State Street, Drawer 20
Montpelier, VT 05620-2601

Dear Commissioner O'Brien:

I am responding to your May 17, 2006, letter making various information requests on behalf of the Vermont Department of Public Service, which appear to be prompted at least in part by recent press coverage concerning Verizon's alleged cooperation with certain classified intelligence gathering activities by the National Security Agency ("NSA").

At the outset I want to reiterate that media reports have made claims concerning Verizon that are false. *See Verizon Issues Statement on NSA Media Coverage*, News Release (May 16, 2006) (attached hereto as Exhibit 1). In particular, Verizon has explained that it has not turned over data on local calls to the NSA and in fact does not even make records of such calls in most cases because the vast majority of customers are not billed on a per-call basis for local calls. *See id.* As Verizon has also made clear, to the extent it provides assistance to the government for national security or other purposes, it "will provide customer information to a government agency only where authorized by law for appropriately-defined and focused purposes." *See Verizon Issues Statement on NSA and Privacy Protection*, News Release (May 12, 2006) (attached hereto as Exhibit 2). Verizon "has a longstanding commitment to vigorously safeguard our customers' privacy," as reflected in, among other things, its publicly available privacy principles. *See id.*

I also wish to make clear that Verizon respects the Department's authority to propound information requests that relate to matters within its jurisdiction, and Verizon regards it as its obligation to respond to such requests within the bounds of the law. Verizon cannot, however, do so in this instance with respect to part of the information requested for the reasons explained below.

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Verizon is prohibited from providing any information concerning its alleged cooperation with the NSA program. While the President and the Attorney General have acknowledged the existence of a counter-terrorism program aimed at al Qaeda involving the NSA,[1] they have made it plain that this program is highly classified, as are the identities of any cooperating parties and the nature of any such cooperation. As a result, as Verizon has already stated, it can neither confirm nor deny whether it has any relationship to the classified NSA program. It is a felony under federal criminal law for any person to divulge classified information "concerning the communication intelligence activities of the United States" to any person that has not been authorized by the President, or his lawful designee, to receive such information. *See* 18 U.S.C. § 798. Further, Congress has made clear that "nothing in this . . . *or any other law* . . . shall be construed to require disclosure of . . . any function of the National Security Agency, [or] of any information with respect to the activities thereof." 50 U.S.C. § 402 note (emphasis added). As the courts have explained, this provision reflects a "congressional judgment that, in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979). Similarly, if there were activities relating to the NSA program undertaken pursuant to the Foreign Intelligence Surveillance Act ("FISA"), that fact, as well as any records relating to such activities, must remain a secret under federal law. *See* 50 U.S.C. §§ 1805 (c)(2)(B) & (C). The same is true of activities that might be undertaken pursuant to the Wiretap Act. *See, e.g.*, 18 U.S.C. §2511(2)(a)(ii)(B).

The United States Government has made it clear that it will take steps to prohibit the disclosure of this information. For instance, the Department of Justice ("DOJ") has invoked the "state secrets" privilege in connection with a pending federal court action against AT&T concerning its alleged cooperation with the NSA.[2/] That well-established privilege permits the government to seek to bar disclosure of information that might otherwise be relevant to litigation where such disclosure would be harmful to national security. *See United States v. Reynolds*, 345 U.S. 1, 7-11 (1953). When properly invoked, the state-secrets privilege is an absolute bar to disclosure, and "no competing public or private interest can be advanced to compel disclosure. . . ." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983). The court's analysis cannot include

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1/ *See, e.g.*, Department of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006); Press Conference of President Bush (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html; Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence (Dec. 19, 2005), available at http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

2/ Numerous class action suits have recently been filed against Verizon in various federal and state courts concerning its alleged cooperation with the NSA program. Verizon expects that the DOJ will invoke the state secrets privilege in those cases as well.

any balancing of the respective needs of the parties for the information. *Kasza v. Browner*, 133 F. 3d 1159, 1166 (9th Cir.), *cert denied*, 525 U.S. 967 (1998); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. 1984). Further, if the subject matter of a litigation is a state secret, or the privilege precludes access to evidence necessary for the plaintiff to state a prima facie claim or for the defendant to establish a valid defense, then the court must dismiss the case altogether. *See, e.g.*, *Zuckerbraun v. Gen. Dynamics Corp.*, 935 F.2d 544, 547-48 (2d Cir. 1991); *Halkin v. Helms*, 598 F.2d 1 (D.C. Cir. 1978); *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

In the AT&T case, the Department of Justice has invoked the state secrets privilege and set forth its view that claims that AT&T violated the law through its alleged cooperation with the NSA program "cannot be litigated because adjudication of Plaintiffs' claims would put at risk the disclosure of privileged national security information." *See* Memorandum of the United States in Support of the Military and State Secrets Privilege and Motion to Dismiss or, in the Alternative, for Summary Judgment, filed on May 13, 2006, in *Hepting v. AT&T*, No. C-06-0672-VRW (N.D. Cal.) (attached hereto as Exhibit 3). A hearing on the DOJ's motion is now scheduled for June 23, 2006. The DOJ's rationale applies equally to Verizon's alleged cooperation with the NSA.

Finally, as noted above, Verizon has made it very clear that it cooperates with national security and law enforcement requests entirely within the bounds of the law. The assumptions in the popular press that the alleged assistance in connection with the NSA program violates the law are without any basis. None of the federal statutes governing the privacy of telecommunications and customer data forbids telecommunications providers from assisting the government under appropriate circumstances. The Wiretap Act, FISA, the Electronic Communications Privacy Act, and the Telecommunications Act all contain exceptions to the general prohibitions against disclosure and expressly authorize disclosure to or cooperation with the government in a variety of circumstances.[3/] Further, these laws provide that "no cause of action shall lie" against those providing assistance pursuant to these authorizations[4/] and also that "good faith reliance" on statutory authorizations, court orders, and other specified items constitutes "a complete defense against any civil or criminal action brought under this chapter or any other law."[5/]

[3/] *See, e.g.*, 18 U.S.C. §§ 2511(2), 2511(3), 2518(7), 2702(b), 2702(c), 2703, 2709; 50 U.S.C. §§ 1805(f), 1843. For example, 18 U.S.C. § 2709 requires a telephone company to disclose certain information if it receives a "national security letter." Similarly, Section 2511(2)(a) expressly authorizes companies to provide "information, facilities, or technical assistance" upon receipt of a specified certification "notwithstanding any other law."

[4/] *See, e.g.*, 18 U.S.C. §§ 2511(2)(a)(ii), 2703(e), § 3124(d)); 50 U.S.C. §§ 1805(i), 1842(f).

[5/] *See, e.g.*, 18 U.S.C. §§ 2520(d), 2707(e); § 3124(e).

As a result of the classified nature of the NSA program and the various prohibitions on disclosure imposed by federal law, Verizon cannot provide some of the information sought in the Department's requests. In particular, it cannot respond at all to requests 1 and 2 because they specifically seek information concerning Verizon's alleged cooperation with the NSA, which Verizon can neither confirm nor deny. As to the remaining requests, Verizon responds below to the extent it can consistent with federal law, but notes that its responses necessarily exclude any information concerning its cooperation, if any, with the NSA and any similar intelligence gathering activities.[6] Verizon's responses also exclude any information concerning other forms of government information demands the disclosure of which is barred by federal law.[7]

Request 3: Has Verizon disclosed or delivered to any other state or federal agency the phone call records of any Verizon customer in Vermont since January 1, 2001? If any such disclosures occurred prior to the date specified, please provide the date on which the disclosures commenced.

Response: Verizon discloses phone call records of Vermont customers to federal or state agencies[8] as authorized by law in response to subpoenas, warrants, court orders or emergency requests. Verizon and its predecessors have provided call records in response to such lawful demands and requests from government agencies over many years, and Verizon does not have information showing the date it first responded to such demands.

Request 4: If the answer to the preceding question is yes, please identify the state and/or federal agency or agencies to which the information was provided or delivered, as well as the categories of information Verizon provided, including the called and calling parties' numbers; date of call; time of call; length of call; name of called and calling parties; and the called and calling parties' addresses.

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6 Verizon notes that the Department lacks authority or jurisdiction with respect to matters relating to national security and federal statutes authorizing disclosures to federal agencies, and by submitting these responses Verizon is not suggesting that it has any such jurisdiction.

7 For example, Section 2511 of the Wiretap Act generally prohibits a carrier from disclosing even the "existence of any interception or surveillance" except in limited circumstances. Similarly, the Foreign Intelligence Surveillance Act requires that carriers maintain any records concerning surveillance under that Act under special security procedures that would prohibit disclosure. 50 U.S.C. § 1805(c)(2)(C).

8 Verizon's responses herein do not pertain to Verizon Wireless, which maintains its own systems, policies and records regarding subpoenas, warrants, court orders and emergency requests from government agencies seeking call records or other customer information.

Response: Verizon has established a centralized unit within our Verizon Legal Compliance group to accept and respond to federal and state agency subpoenas, warrants, court orders or emergency requests seeking call records or other customer information throughout our service area and has designed and implemented systems and policies to ensure timely, appropriate and lawful responses to such requests. Attached as Exhibit 4 is a listing of federal, state and local government agencies which, since January 1, 2002, have served such demands or requests for telephone numbers in Vermont.[9] Exhibit 4 also states the total number of such subpoenas, warrants, court orders and emergency requests received from those agencies during that period. Some words of explanation are in order. First, subpoenas, warrants and court orders for call records often seek data regarding multiple telephone numbers in multiple states. The agencies on the list are those that served such process seeking data with respect to at least one Vermont telephone number. Second, Verizon may not have provided data in response to each of the demands forming the basis of the list, for example where Verizon does not provide service for the number under investigation and thus did not have any responsive data. Third, Verizon's database extends to subpoenas served on or after January 1, 2002. Databases regarding earlier subpoenas are not searchable in a way that would allow Verizon to respond to this Request.

The categories of information provided in response to these subpoenas, warrants, orders and emergency requests vary depending on the type of data sought and the data that Verizon has available, and may include copies of the subscriber's phone bills; the subscriber's name, address, billing history, payment history and credit information; and data showing local and/or long distance calls made from or received at the subject number. Where individual call data is requested and available, it may include the date and time of the call, the number called, the rate, and/or the number of elapsed minutes, depending on the nature of the particular call.

Verizon does not generally maintain copies or records of the data it provides in response to subpoenas, warrants, court orders or emergency requests and thus cannot provide those responses to the Department, including the call data details sought in this Request. Moreover, to the extent that Verizon may have retained any such responses, Verizon is not free to divulge that information. Most government-issued subpoenas warn the recipient not to disclose the subpoena. Subpoenas issued by the Vermont District Court, for example, state that, "Please note that this is a confidential criminal investigation and may not be revealed pursuant to law." Likewise, subpoenas issued by the United States Customs Service state that, "You are requested not to disclose this subpoena for an indefinite period of time. Any such disclosure will impede this investigation and thereby interfere with the enforcement of Federal law."

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[9] Exhibit 4 includes data regarding demands and requests directed to MCI as well as those to Verizon. Exhibit 4 captures only emergency requests made since June 1, 2004, when Verizon began tracking such requests, and may include emergency requests seeking a trap and trace, rather than call records.

Request 5: Please describe the format in which the information was provided (e.g. database with information on a call-by-call basis).

Response: Verizon may provide responses to subpoenas in hard copy or on diskette.

Request 6: Please describe the reporting interval for the provision of such information (e.g. monthly, annually etc.).

Response: Subpoenas, warrants, court orders and emergency requests generally specify a particular date for production and do not impose a recurring reporting interval.

Request 7: Please state how many of Verizon's Vermont customers have had their calling records disclosed or turned over to the NSA or any other governmental entity, on an agency-by-agency basis, since the inception of the disclosures? Please separate the total into business and residential customers.

Response: As noted above, Verizon has provided data in response to subpoenas, warrants, court orders and emergency requests from law enforcement authorities and other government agencies for many years. Verizon does not have records showing how many Verizon-serviced telephone numbers in Vermont (and by extension the number of Verizon Vermont customers) have been the subject of such government demands seeking call records over that period of time, or the number of such demands to which Verizon responded by providing call records.

Request 8: State whether the disclosures of Verizon's Vermont customer call information to the NSA and/or any state or federal agency is ongoing.

Response: As explained above, Verizon cannot and does not respond to this request with respect to the NSA or any other agency or program that is classified or for which a response is prohibited by federal law. With respect to a subpoena, warrant, court order or emergency request for call records, the disclosure in response is a one-time matter and is not "ongoing."

Request 9: State the number of occasions that Verizon has made such disclosures.

Response: *See* Verizon's responses to Requests 4 and 7 above.

Request 10: State whether the records that have been and are being disclosed contain:

a. local calling area records;
b. intrastate long distance records;

c. interstate calling records;
d. international calling records;
e. calling plan records

Response: Verizon's responses to subpoenas, warrants, court orders or emergency requests for call records or other customer information may include any or all of the categories of information specified in this Request, depending on the nature of the demand and the data Verizon has available.

Request 11: Is Verizon disclosing records for any communications services other than telephone calling records (e.g. records for e-mail or internet access)?

Response: Verizon responds to all lawful subpoenas, warrants, court orders or emergency requests, whether they seek records regarding telephone services or other services.

Request 12: Please state whether any such disclosures were made by Verizon:

a. voluntarily upon request of a governmental agency;
b. in response to an exercise of governmental authority;
c. If the response is "b" please describe the specific authority relied upon.

Response: Verizon's policy is to provide customer information (whether regarding telephone service or other services) only where authorized by law. As the data provided indicates, in 1,147 instances since January 1, 2002, those responses have been required by state or federal law or, in the case of responses to emergency requests, authorized by federal law.

Request 13: Does Verizon receive compensation for disclosing customer call information to third parties, including state and federal authorities? If yes, please state

a. the terms of the compensation;
b. the amount of compensation attributable to the company's Vermont operations;
c. the Verizon entity receiving the compensation?

Response: As explained above, Verizon cannot and does not respond to this request with respect to the NSA or any other agency or program that is classified or for which a response is prohibited by federal law.

Pursuant to federal statute, federal and state government agencies are in most instances required to reimburse Verizon for the reasonable costs incurred in searching for, assembling, reproducing and providing information lawfully requested and obtained by the agency. *See, e.g.*, 18 U.S.C. § 2706(a); 50 U.S.C. § 1805(c)(2)(D); *see also*, *Ameritech Corp. v. McCann*, 308 F.

Supp. 2nd 911 (E.D. WI, 2004). Because Verizon has centralized the function of responding to governmental subpoenas, its related costs and compensation are not readily attributable to the company's operations in any given state.

With respect to the terms of the compensation, Verizon charges $0.10 per page to copy customer phone bills or other records kept in the normal course of business. Where a subpoena, warrant, court order or emergency request seeks data that is not kept in the ordinary course of business and a special computer search is required, Verizon charges $150.00 per telephone number per day to reimburse it for the cost of performing the search. Verizon does not require payment of these charges before providing the requested information.

Request 14: Has Verizon modified any of its equipment or other physical plant in Vermont to permit access to data and other information carried on its network by any agency of the federal government? If the answer is yes, please describe the location, equipment, and details of such modifications, and state the purpose for permitting such access.

Response: For the reasons provided above, Verizon cannot respond to this question to the extent it relates to a confidential NSA program because it cannot confirm or deny any cooperation with any such NSA program. More generally, Verizon notes that the federal Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1002(a), requires carriers to make modifications to their hardware and/or software to provide certain capabilities in connection with law enforcement surveillance, and Verizon has made modifications to its network in compliance with that statute.

Request 15: State Verizon's policy for responding to state law enforcement requests for call records of its Vermont customers.

Response: *See* Verizon's responses above.

Request 16: Please provide the information Verizon maintains relative to requests by state and federal law enforcement for call records of Verizon's Vermont customers; identify the location (street address, city, and state) where such records are kept and the name and title of their custodian; and the retention period for such records.

Response: Verizon maintains electronic copies of subpoenas, warrants or court orders received from state and federal law enforcement authorities seeking customer call records. Verizon also maintains an electronic database that includes information regarding each subpoena or other demand received since January 1, 2002, including a tracking number assigned by Verizon, the name of the requesting agency, the date of receipt of the subpoena, the telephone number or numbers for which records are requested and the category of data sought. These records are kept on computer servers in various locations around the country. The custodian of those records regarding subpoenas from state or federal agencies in Vermont (other than subpoenas requesting a special computer search) can be reached by mail at:

Verizon
Custodian of Record
140 West Street, 21st Floor
New York, New York 10007

The custodian of records regarding subpoenas for which a special computer search is required can be reached at the following address:

Verizon
Custodian of Record
99 Shawan Road, Room 133
Cockeysville, Maryland 21030

Verizon's policy is to retain records of subpoenas, warrants, court orders and emergency requests for customer call records or account information for the current year plus the previous two years.

Please contact me if you would like to discuss further the matters addressed in this letter.

Sincerely,
Bruce P. Beausejour / PHZ
Bruce P. Beausejour

cc: Ms. Pamela Porell